IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S OPPOSITION TO "THE CARGILL DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWERS TO ADD COUNTERCLAIMS" [DKT #1450]

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits this response in opposition to the Cargill Defendants' Motion for Leave to Amend Answers to Add Counterclaims [DKT #1450] ("Cargill Defendants' Motion"). The Cargill Defendants' Motion should be denied for the reasons set forth below.

I. Introduction

The Cargill Defendants seek to amend their answers to the Second Amended Complaint to add a "counterclaim for contribution under CERCLA [§ 113(f)] and Oklahoma law," more than two and a half years after this case was filed. *See* Cargill Defendants' Motion, p. 1. As their sole basis for arguing that these amendments would be appropriate at this time, the Cargill Defendants rely on the seven-month old United States Supreme Court decision in *United States v. Atlantic Research Corporation*, 127 S. Ct. 2331 (2007). Because *Atlantic Research* did nothing to alter the law applicable to the State's claims in this case, the Cargill Defendants' Motion is ill-founded, untimely and futile.

Specifically, contrary to the Cargill Defendants' assertions, *Atlantic Research* did not alter: (1) the fact that, even assuming *arguendo* that it were a potentially responsible party, the State has always been able to assert a CERCLA § 107(a) claim; (2) the fact that, even assuming *arguendo* that it were a potentially responsible party, the State may pursue the imposition of joint and several liability on Defendants under its CERCLA § 107(a) claim; or (3) anything about the rules applicable to the assertion of a CERCLA § 113(f) claim. Thus, nothing in *Atlantic Research* compels or even addresses the assertion of the counterclaims the Cargill Defendants seek to add.

II. Legal Standard

It is well-settled that the Court may deny a motion for leave to amend on timeliness and futility grounds:

> [T]he court may deny a motion to amend if it finds any "apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [or] futility of amendment . . . ." *Foman v. Davis,* 371 U.S. 178, 182 (1962). The court may deny a motion to amend if the proposed amendment would be futile, meaning that it could not survive a motion to dismiss. *E. Sprire Communications Inc. v. New Mexico Public Regulation Commission*, 392 F.3d 1204, 1211 (10th Cir. 2004); *Bradley v. Val-Mejias,* 379 F.3d 892, 901 (10th Cir. 2004); *Ketchum v. Cruz,* 961 F.2d 916, 920 (10th Cir. 1992).

Lawrence v. City of Bixby Police Dept., 2007 WL 1690881, *2 (N.D. Okla. June 7, 2007) (emphasis added) (denying in part motion to amend); *Lind v. Aetna Health, Inc.,* 466 F.3d 1195, 1199 (10th Cir. 2006); *Hear-Wear Technologies, LLC v. Oticon, Inc.*, 2007 WL 4379714, *3 (N.D. Okla. Dec. 12, 2007) (denying in part motion to amend on futility grounds).

As explained in *McQueen, Rains & Tresch, LLP v. Citgo Petroleum Corp.*, 2007 WL 4232710, *2 (N.D. Okla. Nov. 28, 2007):

> Further, a court may deny leave to amend "when the party filing the motion has no adequate explanation" for the undue delay. *Minter*, 451 F.3d at 1206 (quoting *Frank v. U.S. West*, 3 F.3d 1357, 1365-66 (10th Cir. 1993)). A court must consider the length of the delay and the reason for the delay to determine if the motion is untimely. *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1285 (10th Cir. 2006). Of course, the threshold inquiry is whether the delay is actually undue. *See Minter*, 451 F.3d at 1205 ("Emphasis is on the adjective: 'Lateness does not of itself justify the denial of an amendment.'" (quoting *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749, 751 (10th Cir. 1975))). The longer the delay, the more likely the motion to amend will be denied.

(Internal quotation marks and citation omitted.)

III. Argument

A. The Cargill Defendants' Motion rests on a thorough misunderstanding of the U.S. Supreme Court's *Atlantic Research* decision

In their Motion, the Cargill Defendants assert that *Atlantic Research* now compels them to assert a CERCLA § 113(f) counterclaim to protect their purported interests. The Cargill Defendants are wrong. The Cargill Defendants have severely misapprehended the holding and reach of *Atlantic Research*.

The holding of *Atlantic Research* is very simple: a private party may bring a cost recovery action under subparagraph (B) of CERCLA § 107(a) under certain circumstances even if that private party is a potentially responsible party ("PRP"). *Atlantic Research*, 127 S. Ct. at 2336.

The holding of *Atlantic Research* is also wholly inapplicable to the State's CERCLA § 107(a) claim. While subparagraph (B) of CERCLA § 107(a) pertains to private parties, subparagraph (A) applies to governmental entities.[1] *See Atlantic Research*, 127 S. Ct. at 2337

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[1] 42 U.S.C. § 9607(a) reads, in pertinent part, as follows:

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
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> (1) the owner and operator of a vessel or a facility,

("subparagraph (B) excludes the persons enumerated in subparagraph (A)"). Accordingly, the State's CERCLA § 107(a) claim has been brought under subparagraph (A) of CERCLA § 107(a), and the State's subparagraph (A) claim is analytically different from the issues addressed in *Atlantic Research.*

Indeed, while *Atlantic Research* may have finally resolved the issue of whether a private party that is a PRP may recover costs under certain circumstances under subparagraph (B) of CERCLA § 107(a), it was well-established long before *Atlantic Research* that a governmental entity may bring a claim to recover costs from PRPs under subparagraph (A) of CERCLA §

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

(Emphasis added.)

107(a) without regard to whether the governmental entity is itself alleged to be a PRP.[2] *See, e.g., United States v. Friedland*, 152 F. Supp. 2d 1234, 1246-49 (D. Colo. 2001) (allowing government to bring subparagraph (A) claim under CERCLA § 107(a) where government was alleged to be a PRP); *United States v. Gurley*, 317 F. Supp. 2d 870, 882-84 (E.D. Ark. 2004), *aff'd,* 434 F.3d 106 (8th Cir. 2006); *State of California Department of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp. 2d 1028, 1036-37 (C.D. Cal. 2002); *State of New York v. Moulds Holding Corp.*, 196 F. Supp. 2d 210, 214-15 (N.D.N.Y. 2002); *United States v. Chrysler Corp.*, 157 F. Supp. 2d 849, 859-60 (N.D. Ohio 2001); *United States v. Hunter*, 70 F. Supp. 2d 1100, 1108 (C.D. Cal. 1999); *United States v. Wallace*, 961 F. Supp. 969, 975 (N.D. Tex. 1996); *City of New York v. Exxon Corp.*, 766 F. Supp. 177, 198 (S.D.N.Y. 1991); *United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991); *United States v. Western Processing Co., Inc.,* 734 F. Supp. 930, 939-40 (W.D. Wash. 1990). Therefore, *Atlantic Research* simply does not apply to the State's CERCLA § 107(a) claim.

And so, the Cargill Defendants are plainly wrong to claim that (1) under pre-*Atlantic Research* precedent "once the Cargill Defendants established Plaintiffs' [sic] PRP status, Plaintiffs' [sic] § 107(a) cost recovery claim would have been defeated," and (2) "[t]he *Atlantic Research* decision altered this structure by recognizing that a PRP may assert a claim for cost recovery under certain circumstances." *See* Cargill Defendants' Motion, p. 2. First of all, because pre-*Atlantic Research* precedent clearly allows a governmental entity that is a PRP to pursue a CERCLA § 107(a) cost recovery claim, even were the Cargill Defendants to establish that the State were a PRP, the State's CERCLA § 107(a) cost recovery claim would not be

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[2] This fact was pointed out to Defendants nearly two years ago in papers filed in connection with the State's motion to sever and stay and/or strike and dismiss the third party complaints. *See* DKT #584, pp. 6-7.

defeated. And second, the *Atlantic Research* decision, which focused solely on cost recovery claims by private parties under subparagraph (B) of CERCLA § 107(a) did nothing to alter the well-established principle that governmental entities may bring cost recovery claims under subparagraph (A) of CERCLA § 107(a) without regard to whether or not they are PRPs.

Moreover, nothing in *Atlantic Research* alters the well-established fact that governmental entities that are PRPs which bring cost recovery claims under subparagraph (A) of CERCLA § 107(a) may pursue joint and several liability against private PRPs.[3] *See, e.g., Friedland*, 152 F. Supp. 2d at 1249 ("I find that the government should be able to impose joint and several liability upon private PRPs, even where the government agencies themselves are deemed PRPs"); *Gurley*, 317 F. Supp. 2d at 882-84; *Alco Pacific*, 217 F. Supp. 2d at 1036-37; *Moulds Holding Corp.*, 196 F. Supp. 2d at 214-15; *Hunter,* 70 F. Supp. 2d at 1108.

Finally, *Atlantic Research* did not alter the rules applicable to the assertion of a CERCLA § 113(f) claim. CERCLA § 113(f), enacted in 1986, provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

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[3] In order to defeat the imposition of joint and several liability, a PRP must first establish divisibility of the injury. As explained in *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1133 (10th Cir. 2002):

> Overall, CERCLA provides the government and private parties with a powerful tool to obtain funding from PRPs to pay for the cleanup of hazardous-waste sites. Because liability is strict, joint, and several, CERCLA plaintiffs under § 9607 need not show that the defendant caused the release of hazardous wastes that required response actions. *Colo. & E. R.R.*, 50 F.3d at 1535. Moreover, the burden rests on a defendant who has only contributed a fraction of the waste to show that the harm from his actions is divisible from the harm caused by the waste of other defendants. *Id.*

42 U.S.C. § 9613(f)(1) (emphasis added). Thus, the potential of a CERCLA § 113(f) contribution claim has long been available to a defendant PRP in a CERCLA § 107(a) cost recovery action. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748-49 (7th Cir. 1993) (holding that, once sued, a party may bring a counterclaim for contribution without admitting liability under CERCLA). Even under the Cargill Defendants' theory that the State is a PRP, the Cargill Defendants could have attempted long ago to pursue the purported counterclaim they (erroneously) claim is now compelled by *Atlantic Research.*

In sum, the Cargill Defendants could have attempted to assert a CERCLA § 113(f) contribution claim against the State back when this case was filed in 2005. They did not. *Atlantic Research* does nothing to alter the State's CERCLA § 107 claim because governmental entities could always and can still assert a claim under CERCLA § 107(a)(4)(A) without regard to whether or not they are PRPs.

B. The Cargill Defendants' Motion is untimely

Because the legal landscape described in Section III.A., *supra*, that surrounds the Cargill Defendants' proposed CERCLA § 113(f) contribution counterclaim long preceded and was not altered by the *Atlantic Research* decision, the Cargill Defendants' Motion should be denied as the assertion of the counterclaims suffers from undue delay. Similarly, the *Atlantic Research* decision says nothing about -- and therefore did not change -- the availability of contribution claims under state law. Accordingly, the Cargill Defendants' assertion that "under *Atlantic Research*, [they] must now assert their affirmative defenses as counterclaims for contribution under CERCLA § 113(f), and by extension under Oklahoma law," *see* Cargill Defendants' Motion, p. 3, is meritless and should be rejected.[4]

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[4] Even assuming *arguendo* that *Atlantic Research* had somehow altered the legal landscape -- which, of course, is incorrect -- this decision was handed down more than half a

Significantly, the Cargill Defendants do not claim that the proposed counterclaims are based on any new facts of which they just gained knowledge. In light of this fact, and the fact that *Atlantic Research* did nothing to alter the legal landscape with respect to this case, the Cargill Defendants' proposed amendments are not supported by the plain language of Fed. R. Civ. P. 13(e). Fed. R. Civ. P. 13(e) provides: "The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading." (Emphasis added.) Similarly, the Cargill Defendants do not claim "oversight, inadvertence, or excusable neglect" under Fed. R. Civ. P. 13(f).

The only conclusion to be drawn is that the Cargill Defendants have, until now, chosen for tactical reasons not to pursue the proposed CERCLA § 113(f) contribution claim. In such a circumstance, their Motion should be denied. *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1519 (10th Cir. 1990) (affirming denial of motion to amend where delay in seeking leave resulted from tactical decision).

In sum, the Cargill Defendants' Motion should be denied as suffering from undue delay.

C. The proposed amendments, if allowed, would cause the State to be prejudiced

The Cargill Defendants assert that their amendments would not inject any new issues into the case or require additional discovery. *See* Cargill Defendants' Motion, p. 6. This assertion is simply incorrect. All of the legal and factual issues associated with a contribution counterclaim are not currently being litigated in this case. The addition of a contribution counterclaim against the State at this late stage of the litigation would plainly require additional discovery, briefing and expert reports. Such additional discovery, briefing and expert reports would substantially

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year ago. The Cargill Defendants give no explanation why they have delayed all this time in bringing their Motion.

disrupt the course of the proceedings, unfairly burden the State, and result in delays that would prejudice the public interests that CERCLA seeks to advance.

D. The Cargill Defendants' proposed CERCLA § 113(f) amendments are futile

The Cargill Defendants' Motion should also be denied on the independent ground of futility. Simply put, the Cargill Defendants' proposed CERCLA § 113(f) contribution counterclaim would not survive a motion to dismiss. In order to state a contribution claim under CERCLA § 113(f), a party must allege a prima facie case of liability under CERCLA § 107(a). *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1517 (10th Cir. 1991). This the Cargill Defendants have not done. As explained by the Tenth Circuit in *Morrison Enterprises*, 302 F.3d at 1135-36:

> When a plaintiff proceeds under § 9613(f), the success of its contribution claim is dependent on the establishment of a prima facie case of liability under § 9607(a). *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1517 (10th Cir. 1991). The elements of a prima facie case of liability under § 9607(a) require a showing (1) that the [counterclaimant] is a "covered person" under CERCLA; (2) that a "release" or "threatened release" of any "hazardous substance" at the site in question has occurred; (3) that the release or threatened release caused [claimant] to incur costs; (4) that [claimant's] costs are "necessary" costs of response; and (5) that [claimant's] response action or cleanup was consistent with the NCP. *See Pub. Serv. Co.*, 175 F.3d at 1181 n. 5.

(Internal quotation marks omitted.)

Moreover, contrary to the Cargill Defendants' faulty assertions, not-yet-incurred RCRA compliance costs do not support a CERCLA § 113(f) contribution counterclaim.[5] On page 7 of their Motion, the Cargill Defendants assert that "courts around the country have found that 'costs arising from RCRA compliance can be recovered in a CERCLA action,'" citing as support -- but

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[5] The Cargill Defendants seek to assert a CERCLA § 113(f) counterclaim for contribution based on prospective costs that they might incur in complying with a RCRA injunction arising out of and addressing their own conduct. CERCLA § 113(f) plainly does not support recovery of such costs.

grossly taking out of context -- the *Union Carbide*, *E.I. du Pont de Nemours (W.D.N.Y.)*, *Rohm & Haas*, and *Mardan Corp.* decisions. These decisions lend the Cargill Defendants no support because in each of these cases, the party seeking to recover RCRA compliance costs had already incurred them (which is not the case with the Cargill Defendants, and they do not claim otherwise), and the respective court held that such party could pursue the recovery of such costs as part of its CERLCA § 107(a) claim -- a claim that the Cargill Defendants do not have (and do not attempt to make). *United States v. E.I. DuPont de Nemours & Co.*, 341 F. Supp. 2d 215, 237 (W.D.N.Y. 2004); *Union Carbide Corp. v. Thiokol Corp.*, 890 F. Supp. 1035, 1044 (S.D. Ga. 1994); *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1052-53 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).

E. The Cargill Defendants' proposed Oklahoma law contribution counterclaim for liability under CERCLA is untimely and futile

The Cargill Defendants also attempt to assert a counterclaim for contribution for liability under CERCLA pursuant to 12 Okla. Stat. § 832. For the same reasons the Cargill Defendants' proposed CERCLA § 113(f) counterclaim is untimely and futile, *see supra*, the Cargill Defendants' proposed contribution counterclaim under 12 Okla. Stat. § 832 for liability under CERCLA is untimely and futile.

IV. Conclusion

For the foregoing reasons, the Cargill Defendants' Motion for Leave to Amend Answers to Add Counterclaims [DKT #1450] should be denied in its entirety.

Respectfully Submitted,

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